

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2008 Session

STEPHEN STRAIN v. TENNESSEE BUREAU OF INVESTIGATION

Appeal from the Chancery Court for Davidson County
No. 06-2867-III Ellen Hobbs Lyle, Chancellor

No. M2007-01621-COA-R3-CV - Filed January 20, 2009

Petitioner appeals the dismissal of his petition filed pursuant to Tenn. Code Ann. § 40-39-207(f) which sought an order permitting his removal from the Sexual Offender Registry (“SOR”). At issue is the application of certain amendments to the sexual offenders registry law, Tenn. Code Ann. § 40-39-201, *et seq.*, which became effective July 1, 2006, to Petitioner, who was convicted of three counts of statutory rape prior to the date of the amendments. The trial court construed Tenn. Code Ann. § 40-39-207(g) to allow the TBI to “retroactively apply the newly revised statute to convictions of statutory rape prior to July 1, 2006, for the purposes of determining an offender’s eligibility for removal from the SOR.” The court further found that the statutory construction did not violate Petitioner’s due process rights or right to be free from *ex post facto* laws. Finding no error in the decision of the trial court, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Richard L. Tennent, Nashville, Tennessee, for the appellant, Stephen Strain.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and William R. Lundy, Jr., Assistant Attorney General, for the appellee, Tennessee Bureau of Investigation.

OPINION

I. Background

The facts incident to this appeal are undisputed. Petitioner was convicted on February 8, 2002, of three counts of statutory rape in violation of Tenn. Code Ann. § 39-13-506. The offenses were committed between April 1, 2000, and May 31, 2000, and, at the times of the offenses,

Petitioner was 34 and 35 years old¹ and the victim was 15 years old. The indictments charge that Petitioner:

did commit the offense of statutory rape by knowingly sexually penetrating [victim], a person between 13 and 18 years of age, when [Petitioner] is at least 4 years older than [victim]; a Class E felony in violation of Section 39-13-506, Tennessee Code Annotated. . . .

As a result of his conviction, Petitioner was required to register as a sex offender on the Tennessee Sex Offender Registry. Since his conviction he has complied with all registration requirements and has not been convicted of any subsequent sexual or violent offenses. On August 11, 2006, Petitioner applied to the Tennessee Bureau of Investigation (“TBI”) to be removed from the registry in accordance with Tenn. Code Ann. § 40-39-207(g)(1). His request was denied, with the letter of denial stating the following:

Upon checking our documentation, it appears that there was a ten-year or more age difference between your client and his victim. If that is the case, he may **not** apply immediately for termination from the Registry and instead must wait ten years after the expiration of his sentence to re-apply for termination.

The law that went into effect on July 1, 2006 allows those convicted of statutory rape to apply for immediate termination from the Registry. However, a condition of the change is that it only applied to statutory rape convictions where the age difference between the victim and offender is less than ten years.

(Bold in original).

Petitioner filed a request for reconsideration, asserting that age was irrelevant under the statute. His request was denied, upon the following basis:

TCA 40-39-207(g)(1) [sic] states that any offender required to register because he was convicted of statutory rape prior to July 1, 2006, may file a request for termination with TBI **if such offender would not be required to register if such offense was committed on or after July 1, 2006**. If Mr. Strain’s offense were committed today, he would be required to register as a sex offender because of the age difference between offender and victim. Because of the age difference, Mr. Strain would be convicted of aggravated statutory rape under 39-13-506(c). TCA 40-39-202(17)(A)(ii) provides the instances when statutory rape is still required to register. Contained in that provision . . . is aggravated statutory rape.

(Bold in original).

¹ Petitioner’s birth date is May 13, 1965.

Petitioner then filed a petition pursuant to Tenn. Code Ann. § 40-39-207(f) in Davidson County Chancery Court seeking review of the TBI decisions and an order permitting his removal from the registry. This appeal ensued from the dismissal of the petition.

Petitioner contends that he met all statutory requirements for removal from the registry; that the TBI lacks the power to determine what Petitioner would have been convicted of in performing its responsibilities under the statute; that TBI's action is an unlawful invasion of the prosecutorial function; that the asserted action of the TBI in enhancing Petitioner's conviction to a crime that did not exist at the time of his conviction violates the *Ex Post Facto* clauses of the United States and Tennessee constitutions; and that Petitioner has been deprived of due process of law in the premises.

II. Standard of Review

Inasmuch as there are no factual disputes, the question on appeal is one of law, which we review *de novo*, with no presumption of correctness accompanying the Chancellor's conclusions of law. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989). This standard includes questions of statutory construction. *Huls v. Alford*, No. M2008-00408-COA-R3-CV, 2008 WL 4682219 (Tenn. Ct. App. Oct. 22, 2008); *State v. Tait*, 114 S.W.3d 518, 521 (Tenn. 2003). In construing a statute, our job is to construe the statute as it is written, *Jackson v. Jackson*, 210 S.W.2d 332, 334 (Tenn. 1948), and to "ascertain and give the fullest possible effect to the statute without unduly restricting it or expanding it beyond its intended scope." *Bellsouth Telecommunications, Inc. v. Greer*, 972 S.W.2d. 663, 671 (Tenn. Ct. App., 1997) (citing *Perry v. Sentry Ins. Co.*, 938 S.W.2d. 404, 406 (Tenn. 1996)).

III. The Sexual Offender Registry

The Tennessee Sexual Offenses and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 ("the Act"), codified at Tenn. Code Ann. § 40-39-201, *et seq.*, is a comprehensive statute requiring persons convicted of certain offenses to register with the TBI and to have their names, addresses and other information maintained in a central offender registry. The legislative findings and declarations in support of the Act's registration requirements are found at Tenn. Code Ann. § 40-39-201(b) and includes the "compelling and necessary public interest" in making information regarding sexual offenders available to the public. The Act seeks to "balanc[e] the sexual offender's and violent sexual offender's due process and other rights against the interests of public security. . .". Tenn. Code Ann. § 40-39-201(b)(4).

The offenses giving rise to the requirement to register are "sexual offenses" defined at Tenn. Code Ann. § 40-39-202(17). Tenn. Code Ann. § 40-39-206 designates some of the information maintained by the TBI to be public information and requires the TBI to place the information so designated on the State's internet homepage; the TBI also is mandated to establish a hotline where members of the public may call to determine whether a particular person is registered as an offender.

Tenn. Code Ann. § 40-39-207 governs applications to terminate registration requirements. Under § (a)(1) an offender who has been required to register as a sex offender must wait ten (10) years after termination of incarceration, active supervision on probation, parole or other alternative to incarceration to file a request for termination of the registration requirements. The request is filed with the TBI, which then determines if the offender has complied with the requirements of the Act and whether the offender has been convicted of any additional sexual offenses or violent sexual offenses within the ten year period; if not, the TBI is to remove the offender's name from the registry. An offender whose request for removal from the registry is denied by the TBI may petition the Davidson County Chancery Court or the chancery court of the county in which the offender resides for a review of the TBI's decision, with the review being conducted "on the record used by the TBI official to deny the request." *Id.* § (f).

Amendments to the Act and to certain provisions of the criminal code at issue in this case were contained in Chapter 890 of the Public Acts of 2006, known as the "Child Protection Act of 2006," effective July 1, 2006. Prior to the passage of Chapter 890, statutory rape was defined as "sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four years older than the victim;" this offense was punished as a Class E felony. Section 5 of Chapter 890 amended Tenn. Code Ann. § 39-13-506 to classify statutory rape into separate categories: (1) statutory rape, (2) mitigated statutory rape, or (3) aggravated statutory rape. The difference between the classes is based on the age of the victim and the difference in ages between the victim and the defendant;² mitigated and statutory rape are punished as Class E felonies and aggravated statutory rape is punished as a Class D felony.

Section 7 of Chapter 890 amended Tenn. Code Ann. § 40-39-202(17)(A)(ii), by including within the definition of sexual offense "[s]tatutory rape under § 39-13-50" if the defendant was an authority figure, or had at least one prior conviction for mitigated statutory rape, statutory rape or aggravated statutory rape.³ Section 9 of Chapter 890 added "aggravated statutory rape, under § 39-13-506(c)" as subdivision (xv) to § 40-39-202(17)(A).

Section 18 of Chapter 890 amended Tenn. Code Ann. § 40-39-207 by adding § (g), which provides in part as follows:

(1) Any offender required to register pursuant to this chapter because the offender was convicted of the offense of statutory rape under § 39-13-506, and the offense was

² Mitigated statutory rape involves a victim between fifteen and eighteen years of age with the defendant being four or five years older than the victim. Statutory rape involves a victim at least thirteen but less than fifteen and the defendant at least four years older than the victim or a victim at least fifteen and less than eighteen and a five year difference in ages between the victim and the defendant. Aggravated statutory rape involves a victim at least thirteen and less than eighteen and an age difference of ten years or more between the victim and the defendant.

³ Each classification of statutory rape referenced the applicable subsection of the amended Tenn. Code Ann. § 39-13-506.

committed prior to July 1, 2006, may file a request for termination of registration requirements with TBI headquarters in Nashville, if the offender would not be required to register if the offense was committed on or after July 1, 2006.

Consequently, as a result of the amendments, those who had been convicted of statutory rape prior to July 1, 2006, and who were on the sexual offender registry on that date, were allowed to be relieved of the registration requirement if they would not have been required to register had the new classifications applied to their offenses.

Tenn. Code Ann. §§ 40-39-207(g) (2), (3), and (4), sets forth the tasks to be conducted once an application for removal has been made pursuant to § (g)(1). The TBI is to determine “whether the offender would not be required to register if the offender had committed the same offense on or after July 1, 2006,” Tenn. Code Ann. § 40-39-207(g)(2), and to act in accordance with its determination.⁴ In making the determination, the TBI is to “review the documentation provided by the offender and contained in the offender’s file.” *Id.* If the offender would not be required to register if the offense had been committed after July 1, 2006, and if the offender has complied with other requirements, the TBI must remove the offender’s name from the registry. *Id.* at § (g)(3). If it is determined that the offender would be required to register, the offender’s name shall not be removed. *Id.* at § (g)(4). An offender whose request is denied may petition for review as in § (f).

IV. TBI’s Action on Petitioner’s Application

Petitioner’s application was considered in accordance with Tenn. Code Ann. § 40-39-207(g). In performing its responsibilities, the TBI applied the definitions contained in the amended Tenn. Code Ann. § 39-13-506 to the facts of Petitioner’s offense and determined that, because of the age differences between Petitioner and the victim, those facts fit the definition of aggravated statutory rape; that he would have been required to register if the offenses had been committed after July 1, 2006; and that, consequently, he was not eligible for termination of the registration requirement. The trial court held that the language of the statute allowed the TBI to “apply the statute as it is now written to the facts of the prior conviction.”

The question presented here is whether, in performing its duties, the TBI correctly utilized the facts giving rise to Petitioner’s conviction, specifically, the difference in age between the victim and Petitioner, in determining whether Petitioner “would have not been required to register” if the offense had been committed after July 1, 2006. Petitioner contends that the statute is clear in defining who is eligible for removal from the registry and that, under the statute, TBI has authority only to determine whether the offender who seeks termination (1) was an authority figure; (2) had prior convictions for statutory rape; (3) had substantially complied with conditions of supervision while on the registry; or (4) had committed additional offenses while on the registry, and thereby would have to register after July 1, 2006.

⁴ The TBI is also to conduct state and federal criminal history checks to determine if the offender has been convicted of any other sexual offenses defined in the statute.

V. Discussion

A. TBI's Application of the Facts of the Offense to the Amended Statute

Chapter 890's addition of subsection (g) to Tenn. Code Ann. § 40-39-207, allowing those who were on the registry at the time of the reclassification but who would not have been required to register if their offenses had been committed under the reclassified offenses, is part of the statutory scheme to require those offenders who, in the judgment of the Legislature, presented the most serious threat to public safety to register. Inasmuch as the purpose of § 40-39-207(g) is to determine eligibility for removal from the registry, application of the statute in this case necessarily requires an inquiry into the age of the victim and the age difference between the victim and the defendant.

In performing its duty to determine whether Petitioner would be required to register if the offense for which he was convicted had been committed after July 1, 2006, the TBI must consider the language of and definitions in the statute that creates the reporting requirement. Tenn. Code Ann. § 40-39-203 requires an “offender,” defined in § 40-39-202(9) as “both ‘sexual offender’ and ‘violent sexual offender’” to register in accordance with the provisions of the Act. “Sexual offender” is defined as “a person who has been convicted in this state of committing a sexual offense as defined in subdivision (17). . .”. Subdivision (17)(A), in conjunction with subdivision (17)(A)(xv), defines “sexual offense” to be “the commission of any *act* that, on or after November 1, 1989, constitutes the criminal offense of aggravated statutory rape under § 39-13-506(c).” (Emphasis added). The facts of Petitioner’s offense, specifically the age difference between Petitioner and the victim, constitutes aggravated statutory rape, thereby requiring him to register as a “sexual offender.” Petitioner’s contention that his eligibility for removal should have been considered under the definition of “sexual offense” at § 40-39-202(17)(A)(ii) is erroneous. The language of the statute is not ambiguous; the function of the TBI is to determine if the act giving rise to the requirement to register was a “sexual offense” within the meaning of any subsection of § 40-39-202(17)(A) and, if so, to deny the application for removal of the registration requirement.⁵

Petitioner argues that the TBI has not been vested with the power to determine what offense a defendant “would” have been convicted of in determining eligibility for removal from the registry. Tenn. Code Ann. § 40-39-207, however, directs the steps the TBI is to take when it determines eligibility for removal when an application for removal is received. One of those steps is to “review the documentation provided by the offender and contained in the offender’s file and the SOR, to determine whether the offender would not be required to register if the offender committed the same offense after July 1, 2006.” Tenn. Code Ann. § 40-39-207(g)(2). The placement of this responsibility on the TBI is within the statutory authority granted the TBI in Tenn. Code Ann. § 38-

⁵ Petitioner argues that “if the legislature had intended to prevent removal of persons convicted of statutory rape who were older by ten or more years than their victim, they could easily have included such limiting language in either T.C.A. § 40-39-202 or 40-39-207.” By adding subsection (xv) to § 40-39-202 the Legislature included those persons who were ten years or more older than their victims in the registration requirement.

6-110⁶ and is consistent with the responsibility given the TBI in the Act to maintain the registry and website. The specific direction to “determine whether the offender would not be required to register if the offense was committed on or after July 1, 2006,” is administrative in nature and is not *ultra vires*.

Similarly, it is not an invasion of the prosecutorial or judicial functions for the TBI to perform the responsibilities given to it under Tenn. Code Ann. § 40-39-207(g)(2). The statute does not involve the TBI in the decision to prosecute the offender, what charge to bring or how to dispose of the charge. The TBI’s functions are performed *after* the offender has been convicted and placed on the registry. Contrary to the argument of Petitioner, the determination of “whether the offender would not be required to register if the offense was committed on or after July 1, 2006” does not require the TBI to predict what charge would be brought by a prosecutor; it requires only a review of the documentation provided and a determination of whether the facts of the offense would constitute a sexual offense as that is defined after July 1, 2006.

B. Constitutional Prohibitions on *Ex Post Facto* Laws

Petitioner contends that the action of the TBI’s actions effectively converted his conviction from a Class E felony to a Class D felony, thereby violating the *ex post facto* clauses of the Tennessee and United States Constitutions. We respectfully disagree.

Generally, the *ex post facto* prohibition is aimed at laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” *Kaylor v. Bradley*, 912 S.W.2d 728, 732 (quoting *California Dep’t of Corrs. v. Morales*, 115 S. Ct. 1597, 1601 (1995)). Thus, an *ex post facto* law changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. See *Cavitt v. Tennessee Dep’t of Corrs.*, No. 01-A-01-9712-CH00713, 1999 WL 236277, at *2 (Tenn. Ct. App. April 23, 1999). Two factors must be present to establish a violation of the *ex post facto* prohibition: “(1) the law must apply retrospectively to events occurring before its enactment, and (2) it must disadvantage the offender affected by it.” *Cavitt*, 1999 WL 236277, at *3. As determined by the Tennessee Supreme Court, the critical question in an *ex post facto* analysis is “whether the law changes the punishment to the [prisoner’s] disadvantage, or inflicts a greater punishment than the law allowed when the offense occurred.” *State v. Pearson*, 858 S.W.2d 879, 883. No bright line rule exists for analyzing *ex post facto* claims; thus, each claim must be made on a case-by-case basis. *Kaylor*, 912 S.W.2d at 732. Therefore, analysis of an *ex post facto*

⁶ Tenn. Code Ann. § 38-6-110(a) provides as follows:

The Tennessee bureau of investigation shall establish a central registry of sexual offenders modeled after statutes enacted in other states. The registry shall include all validated offenders from files maintained by the department of children’s services, all persons who have been arrested for the commission of a sexual offense, and all persons who have been convicted of a sexual offense.

implication, if any, must necessarily begin with a review of the law annexed to the crime at the time it was committed.

Certain provisions of the Act were before the court in *Doe v. Bredesen*, 2006 WL 849849 (E.D. Tenn. Mar. 28, 2006), *aff'd*, 507 F.3d 998 (6th Cir. 2007). The court in *Doe*, reviewing the intent of the legislature in enacting the Act, held that the legislature “intended to implement a civil regulatory scheme, not one of punishment.”⁷ 2006 WL 849849 at*7. Having so held, the court went further to determine whether the specific provisions at issue in that case - lifetime registration, verification and tracking requirements for violent sexual offenders - were “so punitive that when applied they negated the State’s nonpunitive intent.” *Id.* After reviewing at length similar statutes and cases from other jurisdictions, the court concluded that the “classification of sexual offenders under the Act is part of a nonpunitive regulatory framework.” *Id.* at *10. Of particular relevance to the case at bar, the court noted that, with the adoption of the Act:

What did change is the classification of that crime within a nonpunitive regulatory scheme designed to address the danger of recidivism and to protect the health and safety of the public. John Doe’s reclassification is not punishment; rather it is a function of a changing and evolving regulatory scheme that applies to him because of the particular crime he committed. ‘The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that convictions of specified crimes should entail particular regulatory consequences.’ *Smith*, 538 U.S. at 103, 123 S.Ct. At 1153. Since the Act’s regulatory scheme is not punishment, changes made within that scheme that alter John Doe’s status and reporting requirements are not punishment and do not violate the *Ex Post Facto* Clause.

2006 WL 849849 at *10.

We agree that the maintenance of the registry is “part of a nonpunitive regulatory framework” and hold that the registration requirement is not punishment. Both holdings are supported by the findings of the Tennessee Legislature.⁸ The application of the 2006 amendment to Tenn. Code Ann. § 39-13-506, which delineated classes of statutory rape, did not increase Petitioner’s registration requirement or impose additional punishment on him. Prior to the adoption of Chapter 890, he was on the registry; the question raised as a result of the amendment to the statutes was whether he was eligible for removal. Applying the definition of the amended statute to him, the registration requirement remained the same.

⁷ Petitioner concedes “for sake of this appeal” that the registry law is regulatory.

⁸ The Legislative findings include the following at Tenn. Code Ann. § 40-39-201(b)(8):

The general assembly also declares, however, that in making information about certain offenders available to the public, the general assembly does not intend that the information be used to inflict retribution or additional punishment on those offenders.

C. Due Process Concerns

Petitioner argues that he was “convicted” by the TBI of a different offense than that of which he was convicted, that the TBI’s determination that he was not eligible for removal from the registry exceeded the “limited power” granted to it under the statute, and that, as a consequence, he was deprived of due process of law. For the reasons set forth above, we find these arguments to be without merit. In addition, nothing in the record in this case demonstrates that the TBI did anything than follow the dictates of Tenn. Code Ann. § 40-39-207(g), which we have found to be an appropriate means to determine which offenders were eligible for removal from the sexual offender registry, in its handling of Petitioner’s application for removal.

VI. Conclusion

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED. Costs are assessed to Stephen Strain, for which execution may issue of necessary.

RICHARD H. DINKINS, JUDGE